80-86

No. .....

Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1979

ROBERT DUCK, *et al.*,
Petitioners,

vs.

JOYCE HARLESS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Must a City immediately change all of its police employment policies as of March 24, 1972, the date upon which Title VII became applicable to municipalities, to eliminate any vestiges of sex based discrimination, or may it make such changes over a reasonable period of time where it is proceeding in good faith with deliberate speed and is taking all steps available to it?

2. Where certain physical standards are recognized as required for a police officer to capably perform the job safely and effectively, must the City identify the exact amount of physical strength or exertion required, or in 1972 was it permissible to have given, an entrance level physical ability test which tended to identify such characteristics and was the best test then available?

3. Is discriminatory conduct on the basis of sex in employment policies occurring before March 24, 1972, very probative evidence of the existence of post 1972 discrimination?

4. In 1972, was it permissible for a City to give an entrance level test for the job of police officer which identified characteristics necessary to the successful completion of the training program, or was it required to give a test designed to identify characteristics necessary to the successful performance of the job of police officer?

5. Did the giving of a general intelligence test as an entry level test for the job of police officer constitute an acceptable alternative selection procedure because it has a less disparate impact between male and female applicants where it has been established that it has a great disparate impact between black and white applicants?

LIST OF ALL PARTIES

Plaintiffs are a class consisting of all past and present female applicants to the Toledo Police Department since 1965, and all past and present female employees of the Toledo Police Department since 1965. Joyce Harless is representative of that class.

The Defendants are Robert Duck, the former Chief of Police for the City of Toledo; Corrin McGrath, as Chief Duck's successor, the City of Toledo; James B. Daken, as the then City Manager for the City of Toledo; Donald Shanteau, as Safety Director for the City of Toledo; Robert Penn, as president of the Toledo Civil Service Commission; Edgar Kilbride, as a member of the Toledo Civil Service Commission; Harry Smith, as a member of the Toledo Civil Service Commission; and Angelo Tokles, as Executive Director of the Toledo Civil Service Commission.

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OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the United States District Court for the Northern District of Ohio, Western Division, is reproduced in the Appendix at pages A1-A13. The Order of the District Court is reproduced in the Appendix at page A39. The Opinion of the United States Court of Appeals for the Sixth Circuit is reproduced in the Appendix at pages A1-A12.

JURISDICTION

The Judgment of the Court of Appeals was entered on April 23, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the 14th Amendment to the United States Constitution, see Appendix, pp. A40 and A41; Title VII of the Civil Rights Act of 1964; 42 U.S.C. Section 2000(e), see Appendix, pp. A42-A52; and 42 U.S.C. Section 1983, see Appendix, p. A41.

STATEMENT OF THE CASE

Having filed her written charges of discrimination on the basis of sex with the Equal Employment Opportunity Commission (hereinafter E.E.O.C.) on or about July, 1974, on June 24, 1975, Plaintiff was advised by the E.E.O.C. that she was entitled to initiate a civil action in the appropriate district court wthin ninety (90) days after receipt of such notification. On July 14, 1975, Plaintiff amended her complaint bringing the instant action pursuant to the jurisdictional authorities of 28 U.S.C. §§1331 and 1343 (3); 42 U.S.C. §§2000(e) *et seq.;* and 28 U.S.C. §§2201 and 2202.

Plaintiff's Complaint alleged that Defendants unlawfully discriminated against her in employment on the basis of sex, in violation of 42 U.S.C. 2000(e), 42 U.S.C. 1983, and the 14th Amendment to the United States Constitution. The trial court certified a class to consist of Plaintiff, as well as all similar past and present applicants, and past and present employees of the Toledo Police Department since 1965. The case was heard by the District Court without a jury in January, 1977. On April 8, 1977, the trial court filed its Findings of Fact and Conclusions of Law, denying the Plaintiff the relief sought in her Complaint, while maintaining a continuing jurisdiction over the action

for a period of six months. On September 29, 1977, the District Court entered Judgment for the Defendants, dismissing Plaintiff's Complaint (App. A39). On April 23, 1980, the United States Court of Appeals for the Sixth Circuit entered its Decision and Opinion (App. A1). It is this decision and opinion which Petitioners seek to be reviewed.

The Defendant, City of Toledo, is a Municipal Corporation, with a City Charter, organized and existing pursuant to the laws of the State of Ohio. The Toledo Police Department (hereinafter TPD) is a Department of the Defendant City of Toledo. Defendants are the principal officials of the City of Toledo charged with operation of the TPD and with responsibility for its hiring and assignment practices.

Title VII of the Civil Rights Act of 1964 was amended on March 24, 1972, to extend to government agencies and other political subdivisions. Up to and through March 24, 1972, twelve (12) females were employed in entry level classification of the TPD. The profile of the TPD from 1965 to 1975 was as follows:

Year	Male Police Officers	Female Police Officers	Policewomen
1965	535	0	4
1966	589	0	4
1967	572	0	4
1968	659	0	4
1969	718	0	4
1970	744	0	4
1971	718	0	4
1972	697	0	4
1973	709	0	6
1974	720	1	4
1975	717	1	4

On June 8, 1976, thirty-six (36) persons were hired as patrol officers by the TPD: Twenty-nine (29) males and seven (7) females.

Between May 22, 1965, and 1969, three hundred and seventy-two (372) males were appointed to the TPD. No females were appointed during that period.

Prior to November 18, 1974, the TPD maintained two separate entry level job classifications for male and female officers on the TPD. These two separate entry level job classifications were: (1) patrolman; and (2) policewoman.

Prior to November 18, 1974, females employed in the entry level classification of policewoman were not assigned to patrol duty, but to the Crime Prevention Bureau/Juvenile Section, which had many preferential aspects over patrol duty. Males employed in the entry level job classification of patrolman were not so channeled.

No one was appointed to the TPD between 1969 and 1972 due to financial difficulties, and consequently, the TPD was seriously understaffed in 1972. On or about March 1, 1972, and continuing thereafter, the TPD through the Toledo Civil Service Commission (hereinafter TCSC), announced an open recruitment examination for the entry level job classification of "patrolman" on the TPD. The March 1, 1972, announcement for the open recruitment examination for the entry level job classification of "patrolman" resulted in 281 applicants, all of whom were male. On or about June, 1972, the TCSC began administering an open recruitment examination for the entry level job classification of "patrolman" on the TPD. That examination was cancelled by the TCSC on or about July 26, 1972, because of the questionable validity of the selection procedure under certain guidelines issued by the Equal Employment Opportunity Commission in March of 1972. These guidelines were revised at least in part as

a result of the March 24, 1972, amendment of Title VII of the Civil Rights Act of 1964 to include municipalities.

On or about August 4, 1972, the case of *Sarabia v. Duck*, No. C 72-263, was filed in the Western Division of the Northern District of Ohio, challenging the TPD selection process on behalf of a class composed of black and hispanic persons.

On or about September 7, 1972, the TPD through the TCSC, again announced an open recruitment examination for the entry level job classification of "patrolman" on the TPD.

The TPD and its agents recruited minorities to participate in the provisional patrolman's selection process.

On or about October 16, 1972, the TPD appointed a provisional patrolman's class consisting of forty-three (43) males. Two females were appointed to a provisional class of policewoman. Provisional appointments were subject to the provisional appointees' successful completion of a subsequent Civil Service examination.

Women were permitted to register to take the open recruitment patrolman's examination announced September 7, 1972.

In total, there were three hundred and forty-seven (347) applications for the November, 1972, patrolman's examination. Twenty-two percent (22%) of the applicants were blacks or hispanics, while six percent (6%) of the applicants were women.

The November, 1972, patrolman's examination was developed for the TPD by the TCSC in conjunction with Dr. Kenneth Alvarez, an Industrial Psychologist experienced in the police selection area, as an "intermim examination", pending receipt of funding through the Law En-

forcement Assistance Administration for the further development of such an examination. At the time formulation of the 1972 examination began, there were no patrolman exams available anywhere in the United States which were known to have predictive validity. In addition, the absence of a performance evaluation process within the TPD made it impossible to measure the predictive validity of a test. Therefore, the TCSC, with Dr. Alvarez, attempted to formulate an exam that would be content and construct valid.

To develop the November, 1972, patrolman's examination, the TCSC, in conjunction with Dr. Alvarez, prepared a "job analysis" of the police officer's position in the TPD. The job analysis was prepared through observation and interviews.

The November, 1972, patrolman's examination consisted of three parts: (1) a written, mental abilities test; (2) a physical agility test; and (3) a structured oral interview.

The written portion of the exam was designed to measure verbal and reasoning skills required for the position of patrolman. Two general intelligence tests were administered: (1) the Otis-Lennon Mental Ability Test, Advanced Level; and (2) the IPAT Culture Fair Test, Scale 2. The Plaintiffs do not dispute the construct validity of the written exam.

The written portion of the examination was graded on a pass-fail basis and was not used to rank the applicants. Of the two hundred and eighty-one (281) persons who took the exam, two hundred and sixty-three (263) were males and eighteen (18) were females. There was no statistically significant difference between the performances of men and women on the written portion of the November, 1972, patrolman's examination.

To formulate the physical agility portion of the exam, the TCSC observed the day-to-day activities of patrolmen and attempted to select a test that would be content and construct valid. The test administered was borrowed from "Philadelphia, Pennsylvania's Battery for Policeman and Fireman." The same test was used by several other Ohio cities during that time period. The test administered consisted of the following:

(a) push-ups	15 required
(b) sit-ups	25 required
(c) standing broad jump	6 feet required
(d) obstacle course	25 seconds required

An applicant was required to successfully complete three out of four of these requirements in order to qualify for the structured interview portion of the November, 1972, patrolman's examination. Fifty-nine percent (59%) of the seventeen (17) females taking the physical agility test failed, while four and one-half percent (4.5%) of the two hundred and forty-six (246) males taking the test failed. This does not represent a statistically significant difference as testified to by Dr. James King.

The structured oral interview portion of the November, 1972, patrolman's examination consisted of approximately thirty (30) questions, posed to each applicant, which were designed to determine an applicant's communication skills, decision making and problem solving skills, and reactions to stress situation. Applicants answers were scored by a team of interviewers according to their "degree of correctness." The results of the structured oral interview portion of the exam were used as the sole basis for ranking the applicants on the eligibility list. Forty-three percent (43%) [three (3) out of seven (7)] of the females participating in the structured oral interview portion of

the exam failed, while fifteen percent (15%) of the males [thirty-six (36) out of two hundred and thirty-six (236)] failed that portion of the exam.

On all portions of the November, 1972, examination, seventy-seven percent (77%) [fourteen (14) out of eighteen (18)] of the females taking the examination failed, while twenty-two percent (22%) [sixty-four (64) out of two hundred and sixty-three (263)] of the males taking the exam failed.

As a result of the November, 1972, patrolman's examination, two hundred and three (203) persons were placed on an eligibility list; one hundred and ninety-nine (199) males, and four (4) females. The four (4) females placed on the eligibility list were ranked 86, 116, 126, and 184 on the list.

The females ranked number 86 and number 116 on the November, 1972, examination were certified to the TPD by the TCSC for appointment.

As a result of the November, 1972, examination, ninety-six (96) persons were hired by the TPD: ninety-five (95) males were hired as patrolmen; and one (1) female was hired as a patrolman.

The female who was ranked number 116 on the eligibility list, Plaintiff Vivien Butts, was certified to the TPD and was interviewed by the Selection Board, but was not hired. The reasons given for not appointing Ms. Butts, who is black and therefore also a member of the class in *Sarabia v. Duck*, was the adverse criticism of her supervisors in the Police Aide Program and her poor attitude during her interview. The District Court found that the grounds for non-selection of Plaintiff Butts were valid and not pretextuous.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit Court of Appeals made two fundamental errors in reaching its Decision and rendering its Opinion in this case. These fundamental errors are of importance to the Petitioner and to all cities. First, the Circuit Court gave great weight to the pre-1972 conduct of the City. Second, the Circuit Court used the state of the art of employment testing as it existed at the time of making its decision to judge examinations constructed in 1972.

The Circuit Court held:

> "(t)he district court's ruling is erroneous as a matter of law, regardless of the validity of the 1972 examination. Though discriminatory acts occurring before March 24, 1972 do not contravene Title VII, *Hazelwood School District v. United States,* 433 U.S. 299, 309 (1977), those acts are very probative evidence of the existence of post-March, 1972 discrimination, especially where the defendants' decisionmaking apparatus changes so little, as with TPD. *Id.* at 306 (sic 309) n.15; *Detroit Police Officers' Ass'n v. Young,* slip op. at 22. . . ."

What this Court said in *Hazelwood, supra,* is:

> ". . . Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully exluding Negroes. . . ."

Footnote 15, at that point is as follows:

> "This is not to say that evidence of pre-Act discrimination can never have any probative force. Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decisionmaking process had undergone little change Cf. Fed Rule Evid. 406; *Arlington Heights v. Metropolitan Housing Dev. Corp.* 429 U.S. 252, 267, 50 L.Ed.2d 450, 97 S.Ct. 555; 1 J. Wigmore, Evidence § 92, 2 id., §§ 302-305, 371, 375 (3d ed 1940). And, of course, a public employer even before the extension of Title VII in 1972 was subject to the command of the Fourteenth Amendment not to engage in purposeful racial discrimination."

The Circuit Court has converted the Supreme Court's possibility that a pre-Act discrimination ". . . might in some circumstances support the inference . . ." to "very probative evidence".

In any complex business organization, the decisionmaking process is not changed overnight. Public employers are notoriously slower to change than private employers. The evidence in this case was that Chief Robert Duck resigned on February 28, 1974. The Sixth Circuit recognized that his replacement was quick to act in changing to a general entry level classification and in recruiting women. The Circuit Court noted that the change in attitude between the two was striking.

However, more important, the Defendants had voluntarily ceased the discriminatory practices and policies. The Circuit Court recognized that the City had acted in good faith and had made a voluntary effort to correct past discrimination.

The Circuit Court went on to hold that the 1972 examination was not valid and job related. The major flaw according to the Circuit Court was the physical ability test. In order to remove barriers to the eligibility of females, the City eliminated the height and weight requirements which it previously used. The Circuit Court said:

> ". . . undoubtedly, police officers must meet certain physical standards to be capable of performing their jobs safely and effectively. . . ."

However, the Circuit Court found that the Defendants failed to meet the burden of proof that the test was valid and job related. The Circuit Court first criticizes the City's job analysis for failing to ". . . specifically define the amount of strength or the extent of the physical exertion required." *Dothard v. Rawlinson*, 433 U.S. 321, 331-32 (1977).

The job of a police officer involves a variety of tasks. The specific amount of physical strength or physical exertion could never be specifically defined. The Circuit Court's reliance on *Dothard, supra,* is misplaced and is ironic in that in the *Dothard* case, *supra,* this Court held that the height and weight requirements imposed by Alabama Statute of 5'2" and 120 lbs. for employment as a state prison guard did not have ". . . a relationship to strength, a sufficient but unspecified amount of which is essential to effective performance as a correctional counselor." This Court said:

> "We turn, therefore, to the appellants' argument that they have rebutted the prima facie case of discrimination by showing that the height and weight requirements are job related. These requirements, they say, have a relationship to strength, a sufficient but unspecified amount of which is essential to effec-

tive job performance as a correctional counselor. In the District Court, however, the appellants produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance. Indeed, they failed to offer evidence of any kind in specific justification of the statutory standards.

If the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly. Such a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that 'measure(s) the person for the job and not the person in the abstract.' *Griggs v. Duke Power Co.* 401 US, at 436, 28 L Ed 2d 158, 91 S Ct 849. But nothing in the present record even approaches such a measurement." At 331 and 332.

In this case, contrary to the facts in *Dothard, supra,* the City had eliminated height and weight requirements and instead tested strength directly. The District Court found, and Plaintiffs' expert, Dr. Henderson, recognized, ". . . that strength is a construct important to police work, and further recognized that pushups, and a standing broad jump would 'tend' to show strength." (App. A32). The District Court went on to find:

". . . that the defendants have carried their burden of demonstrating that the physical agility portion of the 1972 exam was reasonably related to job performance. Having recently eliminated both height and weight requirements, it was essential that a physical agility requirement be included in the selection process, and the evidence shows that defendants took all steps possible to locate an appropriate examination." (App. A32).

The Circuit Court ignores the fact found by the District Court that the defendants took all steps possible to locate an appropriate examination. At the time this test was given, 1972, testing of this kind was in its infancy. In fact, the City of Toledo was a pioneer and leader in the development of such testing. It must also be remembered that at the time, the City was responding to the need to include blacks and hispanics on its police force. The City did attempt to validate the physical ability test in 1974, when the information became available. The Circuit Court apparently felt that the lack, until that time, of information upon which to make a validation study was a reason for holding the test invalid. The fact that the physical ability test was eliminated from the 1975 examination is merely a reflection of the growth of the art of employment examinations and the City's willingness to respond to change. The Circuit Court's statement that elimination of the physical ability test had no apparent detrimental effect on the Police Department is not supported by the record. In fact, the testimony indicates that elimination of the physical ability test resulted in problems in the training of the class selected as a result of that test.

The Circuit Court apparently felt that strict adherence to the requirements for an interim exam as set forth in 29 C.F.R. Section 1607.9 was required. This Court has held that the E.E.O.C. guidelines are "entitled to great deference" from courts determining whether employment selection devices comply with Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), but such guidelines are not mandatory, *United States v. City of Chicago*, 573 F.2d 415 (1977).

In fact, the City complied with Section 1607.9 of the E.E.O.C. regulations and guidelines because it had in prog-

ress validation procedures which were designed to produce, within a reasonable time, the additional data required. The District Court found:

> "The testimony of David Boston indicates that the defendants went to considerable length to develop a nondiscriminatory interim examination which could be used to select a police class as quickly as possible in order to alleviate the City's then critical police shortage. At the same time, the City sought federal funding for the development of a validated examination for future use. While subsequent developments in the art of testing may have demonstrated deficiencies in the interim examination which would make it suspect if used today, in light of the evidence adduced at trial, the Court concludes that the 1972 Patrolman's examination was a valid interim examination, see 29 C.F.R. §1607.9 (1975), and did not deprive the plaintiffs of their rights under Title VII." (App. A34 and A35).

The Circuit Court also found that the structured oral interview portion of the test ". . . was rife with the potential for discrimination and is not job-related." The Circuit Court found that:

> "(t)he interview related only to training performance at the police academy and not to actual job performance; consequently, it is deficient as a matter of law. *Blake v. City of Los Angeles,* 595 F.2d at 1382."

In fact, the structured oral interview did not relate to training at the police academy but instead presented the applicant with a situation they were likely to encounter in actual police work. The District Court found:

"The structured oral interview portion of the November, 1972 Patrolman's examination consisted of approximately thirty (30) questions, posed to each applicant, which were designed to determine an applicant's communication skills, decision making and problem solving skills, and reactions to stress situations. (App. A20).

In its Conclusions of Law, the District Court held:

"Defendants offered evidence by way of expert testimony, supplemented by statistical documentation, to demonstrate that the structured oral interview portion of the 1972 exam had both construct and content validity, and also had criterion validity as measured against Police Academy performance. Defendants' expert, Mr. Boston, testified that the structured oral interview portion of the exam which consisted of hypothetical questions simulating situations likely to be encountered by patrolmen, measured several dimensions identified through the job analysis that would differentiate between persons who would be better police officers if put in a position to perform patrol functions. In addition, a study of the results of the structured oral interview portion of the 1972 examination, introduced into evidence as Plaintiffs' Exhibit 18, indicates that a significant relationship existed between performance in the structured interview and performance at the Police Academy.

The Court finds this evidence of training program validation, together with the expert testimony of Mr. Boston regarding the content and construct validity of the exam, sufficient to satisfy the defendants' burden of demonstrating that the structured oral interview portion of the exam was manifestly related to job performance. In reaching this conclusion, the Court relies on the language of 29 C.F.R. §1607.5(3)

(1975), as well as the Supreme Court's recent discussion of employment selection tests in *Washington v. Davis,* 426 U.S. 229, 250-51 (1976), by analogy." (App. A32 and A33).

The Circuit Court's statement that the interview related only to training at the Police Academy could only have been referring to the validation of the exam with reference to performance at the Police Academy, a procedure that was specifically approved by the Court in the case of *Washington v. Davis,* 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040, where it was said:

"We agree with petitioners and the federal parties that this was error. The advisability of the police recruit training course informing the recruit about his upcoming job, acquainting him with its demands, and attempting to impart a modicum of required skills seems conceded. It is also apparent to us, as it was to the District Judge, that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen. Based on the evidence before him, the District Judge concluded that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer. *This conclusion of the District Judge that training-program validation may itself be sufficient is supported by regulations of the Civil Service Commission, by the opinion evidence placed before the District Judge, and by the current views of the Civil Service Commissioners who were parties to the case.* Nor is the conclusion foreclosed by either Griggs or Albemarle Paper Co. v. Moody, 422 US 405, 45 L Ed 2d 280, 95 S Ct 2362

(1975); and it seems to us the much more sensible construction of the job-relatedness requirement." (Emphasis added.)

Finally, the Circuit Court held that Defendants could have avoided using the examinations by using biographical data and written intelligence tests. The Court found that such written intelligence tests did not have a substantial disparity impact between males and females. However, the Circuit Court totally ignored the fact that the written intelligence test had a substantial disparity impact on black and hispanic minorities. Thus the District Court found:

". . . However, it is undisputed that both the physical agility and structured oral interview portions of the exam were designed in response to the defendants' recognition that they could no longer impose a height and weight requirement as a measure of physical ability, and could no longer rely exclusively on certain intelligence tests as selection criteria, due to the disproportionate impact these criteria were known to have on black and hispanic minorities." (App. A34).

The Defendants were already Defendants in the case of *Sarabia v. Duck* brought on behalf of blacks and hispanics. (See Findings of Fact 42 and 43. App. A22 and A23).

The suggestion that the Defendants regress to a less discriminatory general intelligence test as a valid alternate selection procedure is totally inappropriate.

CONCLUSION

The Circuit Court recognized that the ". . . defendants may have searched diligently for a valid examination and were hampered by the infancy of sophisticated testing techniques . . ." and that the defendants acted in good faith and voluntarily corrected past discriminatory practices. Considering those facts, defendants should not be found in violation of Title VII as a result of pre-1972 practices, nor as a result of imposition of better testing standards developed after the 1972 examination. Accordingly, defendants request that a Writ of Certiorari be allowed and that this Court review the Judgment of the Circuit Court of Appeals and reverse the same.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed April 23, 1980)

No. 77-3293

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOYCE HARLESS, *et al.*,
Plaintiffs-Appellants,

v.

ROBERT DUCK, *et al.*,
Defendants-Appellees.

APPEAL from the United States District Court
for the Northern District of Ohio.

Before: LIVELY, BROWN and JONES, *Circuit Judges.*

JONES, *Circuit Judge.* In this class action against the City of Toledo, Toledo Police Department (TPD), Toledo Civil Service Commission (TCSC), and individual city officials, the district court found intentional discrimination in employment on the basis of sex in violation of the Fourteenth Amendment and 42 U.S.C. § 1983. After a bifurcated trial on the issue of liability only, the district court denied all relief to the named plaintiffs and the class members by holding that they had not established any injury and that the discrimination had ceased as of March 24, 1972, when Title VII, 42 U.S.C. § 2000e, was amended to apply to municipalities. Because many of the district court's conclusions of law are inconsistent with its findings

of fact, we reverse and remand for proceedings on the appropriate remedy.

The named plaintiffs are women who took the November, 1972, patrolman's examination, the 1974 policewoman's examination, and/or the 1975 patrol officer's examination. Harless took all three examinations, but was never within appointing rank. Plaintiffs Hyatt and Gilford were within appointing rank on the 1975 test, but were not hired because of the TPD's effort to hire minorities.[1] Plaintiff Vivian Butts was certified by TCSC for appointment on the basis of the 1972 test, but was not hired after an interview. She also took the 1975 examination. These named plaintiffs represent the certified class of all past and present female applicants to the TPD since 1965 and all past and present female employees of the TPD since 1965. Defendants do not contest the class certification.

From 1965 to 1975, only twelve women were employed by TPD in entry level classifications. In 1975, TPD employed 717 male police officers, one female police officer, and four policewomen. Until November, 1974, TPD maintained separate entry level classifications for male and female officers; patrolman and policewoman. Before November, 1974, females were assigned only to the Crime Prevention Bureau/Juvenile Section and, before December, 1976, could not permanently transfer from this assignment. Consequently, because all promotions to divisions and su-

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1. TPD is no stranger in this Court. In *Afro-American Patrolman's League v. Duck*, 503 F.2d 294 (6th Cir. 1974), this Court affirmed the district court's ruling that the TPD discriminated on the basis of race in its promotion policies. Another lawsuit filed in the district court by other plaintiffs alleged racial discrimination in hiring. A consent decree was entered on November 25, 1974, which established an affirmative action program and minority recruitment. The district court retained jurisdiction and entered an order enforcing the consent decree, which this Court affirmed in *Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914 (6th Cir. 1979).

pervisory ranks were made from uniform patrol, women were denied promotions, except within the Crime Prevention Bureau. At the time of trial in 1977, only one female police officer had achieved the rank of sergeant. Until the time of trial, no woman had ever been assigned to eleven bureaus, despite testimony by the then Chief of Police and the then Safety Director that women could perform those jobs.[2]

TPD was unable to hire anyone from 1969 until 1972, because of financial limitations. Being seriously understaffed, TPD, through TCSC, announced on March 1, 1972, a recruitment examination for "able ambitious young men" who desired to be patrolmen. TCSC cancelled the test on July 26, 1972, because of the questionable validity of the selection procedures under the EEOC guidelines. In September, 1972, TCSC again announced the examination for "able ambitious young men."[3] Despite the advertising, eighteen women applied for and took the examination. Two hundred sixty-three men also took the test.

The 1972 patrolman's examination consisted of three parts:

(1) two written, general intelligence tests; (2) a physical ability test; and (3) a structured oral interview. The first

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2. The change in attitude and policy between Police Chief Duck and Police Chief McGrath, who came to Toledo in 1974, is striking. In response to an inquiry from TCSC, Chief Duck declared that women were not to be assigned to uniform patrol or the selective enforcement task force. Therefore, TCSC administered in 1974 a separate recruitment examination for policewomen. Chief McGrath quickly demanded one examination for a single entry level classification of patrol officer. He started a recruiting program for women. Furthermore, he testified at trial that a number of cities had women on patrol in 1971.

3. Because the plaintiffs' class does not include prospective applicants, plaintiffs were not injured by this discriminatory advertising. Therefore, we do not consider TPD's advertising in this appeal.

two parts were graded on a pass-fail basis. The ranking of applicants was based solely on scores from the structured oral interview. The physical ability test had four parts, of which the applicants were required to complete three parts in order to pass: 15 push-ups, 25 sit-ups, 6-foot standing broad jump and 25-second obstacle course. The structured oral interview had 30 questions, designed to test communication skills, decisionmaking and problem-solving skills, and reaction to stress. A team of two interviewers graded answers on their degree of correctness. There were four teams of interviewers. Both the physical ability test and structured oral interview had a statistically significant disparate impact on female applicants.

Two hundred three persons were placed on an eligibility list after the 1972 test: 199 men and 4 women. Ninety-five men and one woman were hired.

TPD, through TCSC, gave a policewoman test in January, 1974. Though ten women were interviewed, none was hired because of a financial squeeze.

After TPD abolished the separate entry level classifications and established the single category of patrol officer, TPD, through TCSC, administered a test in July, 1975, for patrol officer. This test did not have a statistically significant disparate impact on women. Two hundred seventy-three of 1244 applicants (22%) were female. Twenty-nine males and seven females (19.4%) were hired.

II

Pre-March, 1972 Discrimination

On the basis of the statistics and policies discussed above, the district court found intentional employment discrimination on the basis of sex from 1965 until March, 1972 and held that this conduct violated the Fourteenth

Amendment and 42 U.S.C. § 1983. The statistical evidence of discrimination is glaring and alone suffices to support the district court's findings. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977); *Detroit Police Officers' Assn. v. Young*, No. 78-1163 (6th Cir., Oct. 12, 1979), slip op. at p. 17. TPD had not conducted any comparison studies of the job performances of male and female police officers. Therefore, it is abundantly clear that the discriminatory policies in hiring, classification, assignment, and promotion were grounded on impermissible and archaic traditional stereotypes. *See City of Los Angeles, Dept. of Water v. Manhart*, 98 S. Ct. 1370, 1375-76 (1978).

III

Post-March, 1972 Discrimination

The district court held that defendants did not violate Title VII, since all discrimination had ceased as of March 24, 1972. In making this determination, the district court focused on the validity of the 1972 examination. Because the test was found valid and job-related according to EEOC guidelines, 29 C.F.R. 1607.1, *et seq.*, defendants were absolved of any Title VII violation.

The district court's ruling is erroneous as a matter of law, regardless of the validity of the 1972 examination. Though discriminatory acts occurring before March 24, 1972 do not contravene Title VII, *Hazelwood School District v. United States*, 433 U.S. 299, 309 (1977), those acts are very probative evidence of the existence of post-March, 1972 discrimination, especially where the defendants' decisionmaking apparatus changes so little, as with TPD. *Id.* at 306 n. 15; *Detroit Police Officers' Ass'n v. Young*, slip op. at 22. TPD continued the same discriminatory policies in hiring, classification, and promotion until November, 1974,

in transfers until December, 1976, and in assignments until the time of trial. The facts as found by the district court compel the conclusion that the discrimination did not cease as of March 24, 1972. Because not all of defendants' employment decisions after March 24, 1972 were made in a wholly nondiscriminatory way, defendants did not present a legitimate defense to the Title VII claim. *Detroit Police Officers Assn. v. Young,* slip op. at 22. The discriminatory practices continued far too long after Title VII was amended to apply to municipalities.[4]

Moreover, the district court erred in declaring the 1972 examination valid and job-related. TCSC developed the 1972 examination in conjunction with an industrial psychologist experienced in police selection. TCSC attempted to formulate a test that would be content and construct valid.[5] A job analysis was first prepared based

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4. Because the discriminatory practices continued for up to five years after the amendment of Title VII, we need not address the question of whether Title VII allows the municipalities a grace period in which to achieve compliance. *See Blake v. City of Los Angeles,* 595 F.2d 1367 (9th Cir.), *cert. pending* (1979).

We also need not address the question of whether any fair and neutral practices operated impermissibly to freeze the status quo reflecting past discrimination *See International Brotherhood of Teamsters v. United States,* 431 U.S. at 349. We note that in *Afro-American Patrolmen's League v. Duck,* 503 F.2d 294 (6th Cir. 1974), this Court rejected a similar defense by the same defendants on the ground that the use of an examination, coupled with promotion rules, operated to perpetuate past discrimination.

5. The employer may use any of three methods to validate an examination: criterion validity, construct validity or content validity. *Washington v. Davis,* 426 U.S. 229, 247 n. 3 (1976); *Firefighters Institute for Racial Equality v. City of St. Louis,* 549 F.2d 506, 511 (8th Cir.) *cert. denied,* 434 U.S. 819 (1977). Criterion validity compares evaluations of employees' job performances with test scores. Construct validity determines the degree to which applicants possess traits which are considered important for the job. Content validity assesses the ability of the applicants to perform specific tasks which must be performed on the job. TPD attempted to prove construct and content validity because there was an inadequate sample and time to perform the predictive criterion validity. The District Court found criterion validation to be impracticable.

on interviews with police officers and on personal observation. The job analysis defined the functions and demands placed on police officers.

The major flaw with the 1972 examination was the physical ability test. Defendants argued that the physical ability test was necessary because the height and weight requirements had been abolished. Undoubtedly, police officers must meet certain physical standards to be capable of performing their jobs safely and effectively. However, this obvious fact does not relieve defendants of their duty to formulate a nondiscriminatory test.

Defendants did not meet their burden of proving that the test was valid and job-related.[6] First, the job analysis discloses the need for some physical activity on the job, but does not specifically define the amount of physical strength or extent of physical exertion required. *Dothard v. Rawlinson,* 433 U.S. 321, 331-32 (1977). As an official of TCSC stated, the test was developed through an "intuitive process." Hearing on Preliminary Injunction, p. 92. Second, the test was taken from the physical condition test in the manual on selection of public employees published by the Public Personnel Association. Tr. 107. The test had been used previously in other cities, but had never been validated. Defendants did not begin to attempt to validate the physical ability test until 1974, App. 28, Stipulation No. 127, and lacked any information before

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6. The burden of proof in a Title VII action shifts; first, plaintiff must establish a prima facie case by demonstrating disparate impact or disparate treatment; then, defendant can rebut by establishing a defense, such as, business necessity, for example, that the test bears a manifest relationship to successful and efficient job performance; finally, plaintiff can establish liability, despite a valid defense, if an alternative selection device not creating the disparate impact can be proven. *Dothard v. Rawlinson,* 433 U.S. 321 (1977); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

then on which to validate the test.[7] Third, there is no justification in the record for the types of exercises chosen or the passing marks for each exercise. Finally, after further study in 1974, the physical ability test was deleted from the 1975 examination, apparently with no detrimental effect on the police department. *Blake v. City of Los Angeles,* 595 F.2d at 1382. Therefore, we hold that the physical ability test was not job-related and contravened Title VII.

The structured oral interview is also suspect. Both David Boston, the TCSC official who developed the test, and Russell Strasbaugh, the graduate student who prepared the validation study on the structured oral interview, admitted that the job analysis lacked objectivity and was not systematic. The interview related only to training performance at the police academy and not to actual job performance; consequently, it is deficient as a matter of law. *Blake v. City of Los Angeles,* 595 F.2d at 1382. Moreover, Strasbaugh stated that the relevance, reliability and overall worth of the individual academy measures of performance could not be established and he questioned the existence of a relationship between success in training and success on the job. *See United States v. City of Chicago,* 549 F.2d 415, 430 (7th Cir.) *cert. denied,* 434 U.S. 875 (1977). Boston and Strasbaugh agreed that the grading of the interviews was subject to a host of errors resulting from a lack of standardized conditions, rater bias, and the lack of criteria on which to judge the degree of correctness of answers. These problems overwhelm Strasbaugh's ultimate conclusion of validity. We conclude that the structured interview was rife with the potential for discrimination and is not job-related. *Senter v. General Motors Corp.,* 532 F.2d 511, 529 (6th Cir.), *cert. denied,*

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7. For these reasons, the examination cannot be a valid interim test under 29 C.F.R. § 1607.9.

429 U.S. 870 (1976); *Afro-American Patrolmen's League v. Duck*, 503 F.2d at 301.

Finally, defendants could have avoided using the discriminatory and invalid portions of the examination. Plaintiffs and Strasbaugh suggested that better alternative bases for selection were biographical data and the written intelligence tests. The written intelligence tests did not have a statistically disparate impact between males and females. Therefore, even if the test had been job-related, TPD would have violated Title VII by not using alternative selection procedures having a less disparate impact between male and female applicants.

It must be remembered that defendants postponed the 1972 examination once in order to devise a test consistent with EEOC guidelines. Defendants knew their responsibilities and potential liability. Though defendants may have searched diligently for a valid examination and were hampered by the infancy of sophisticated testing techniques, their use of an unlawful examination cannot be excused. Therefore, we hold, contrary to the district court, that the 1972 examination was not job-related according to Title VII standards.

Defendants' sole defense to the Title VII claim was that the discriminatory policies and practices had ceased as of March 24, 1972. Because defendants' discriminatory practices and policies continued for well over two years after the applicability of Title VII and because the 1972 examination was not job-related, we hold that defendants did violate Title VII.

IV

Injury to Plaintiffs

From our discussion above, it is apparent that the named plaintiffs and class members were injured by defendants' discriminatory acts including the invalid 1972 examination. Even if the district court had been correct in declaring that the named plaintiffs had not established their injuries, the case should not have been dismissed. The lack of injury to named plaintiffs does not moot the injuries to class members. *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 754 (1976), *citing with approval, Roberts v. Union Co.*, 487 F.2d 387 (6th Cir. 1973). Therefore, the district court should have considered the injuries, if any, to class members before denying all relief on the Fourteenth Amendment claim.

The district court also erred in finding an absence of discrimination in internal employment practices because there was no evidence that any woman in the TPD had ever sought and been denied assignment to divisions other than the Crime Prevention Bureau/Juvenile Section. Such testimony may be necessary at the trial on remedy in order to grant individual relief, *International Brotherhood of Teamsters v. United States*, 431 U.S. at 343 n. 24, *Franks v. Bowman*, 424 U.S. at 772-73, but it is certainly not required at the liability stage, after plaintiffs have presented overwhelming evidence of pervasive discrimination in all aspects of TPD's internal employment practices. TPD's policies had been engraved in stone since the 1920's. Every woman on the police force and every woman interested in becoming a member of TPD knew her restricted role.[8] Even when TCSC inquired to Chief Duck in 1973

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8. A female police officer, hired in 1972 and later assigned to recruiting, testified that many women did not want to become "policewomen" because of the separate entry level classification and the limited duties.

about a change in the role of women, he declined to change classifications. Any protest or application for an assignment outside the Crime Prevention Bureau/Juvenile Section would have been futile and perhaps also foolhardy. Consequently, liability can be found without the need for evidence of such futile gestures. *Dothard v. Rawlinson,* 433 U.S. at 330; *Mitchell v. Mid-Continent Spring Co. of Kentucky,* 583 F.2d 275, 281 (6th Cir. 1978), *cert. denied,* 99 S. Ct. 2030, 2031 (1979). ("The standard under Title VII in this Circuit is that females must have *equal employment opportunities,* not merely that their applications, if any, be processed fairly.") We hold that defendants' internal employment practices before March, 1972 violated the Fourteenth Amendment and 42 U.S.C. § 1983, and that the continuation of the same practices and policies after March 24, 1972 violated Title VII.

V

The district court dismissed the City of Toledo as a party-defendant. In light of *Monell v. Department of Social Services,* 436 U.S. 658 (1978), the City of Toledo must be reinstated as a party. Upon remand, the district court must determine whether or not the City of Toledo is liable for any of the discrimination against plaintiffs. Explicit factfinding is necessary, since the principle of *respondeat superior* cannot be applied. *Id.*

VI

Relief

Because the district court bifurcated the trial and never heard evidence on remedy, we remand the case for remedial proceedings. The delay in providing a remedy for plaintiffs has already been lengthy. Therefore, we

expect that the district court will make every effort to expedite the remedial proceedings.

Certainly many events have occurred within TPD since March 24, 1972. The district court found that defendants had voluntarily ceased their discriminatory practices and policies. We have held today that the discrimination did not cease soon enough. Good faith, which hopefully does exist, cannot shield a party from liability for the prolonged continuation of discriminatory practices and policies. Similarly, good faith or a voluntary effort to correct past discrimination does not preclude the award of affirmative relief, though each is a factor to be considered. *EEOC v. New York Times Broadcasting Service, Inc.*, 542 F.2d 356, 361 (6th Cir. 1976); *United States v. International Brotherhood of Electrical Workers, Local No. 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970). At this point in time, we would be premature in discussing the necessary scope of the remedy. Therefore, we simply remand to the district court for trial on the appropriate remedy.

As plaintiffs have prevailed in establishing defendants' liability, the district court must also consider on remand the amount of reasonable fees for plaintiffs' attorneys for their work in the district court and court of appeals. 42 U.S.C. §§ 1988, 2003-5(k). The costs of this appeal shall be assessed against the defendants.

The judgment of the district court is reversed and remanded for proceedings consistent with this opinion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Filed April 8, 1977)

No. C 74-296

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOYCE HARLESS, *et al.*,
Plaintiffs,

vs.

ROBERT DUCK, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WALINSKI, *J*:

PRELIMINARY STATEMENT

Plaintiff, Joyce Harless, brings this action on behalf of herself and all other persons similarly situated under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Equal Protection Clause of the Fourteenth Amendment, and 42 U.S.C. § 1983, claiming that she was unlawfully discriminated against in employment on the basis of sex. Jurisdiction is alleged pursuant to 28 U.S.C. §§ 1331 and 1343(3); 42 U.S.C. § 2000e-5(f)(3); and 28 U.S.C. §§ 2201 and 2202. Plaintiff prays for declaratory and injunctive relief and also seeks to recover a "sum of money equal to the difference between pay received by

the plaintiff and the class she represents and the pay she and the class would have received but for the discrimination of defendants." (Amended Complaint ¶ 32.)

Prior to trial, a conditional class consisting of all past and present female applicants to the Toledo Police Department since 1965, and all past and present female employees of the Toledo Police Department since 1965, was certified by the Court. The case was tried to the Court on January 10-12, 1977. The Court having considered the pleadings, the testimony of the witnesses, the stipulations entered into by the parties, and the documents in evidence, hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff, Joyce Harless, is a thirty-year old female and a citizen of the United States. Plaintiff Harless has taken the following open recruitment examinations administered by the Toledo Civil Service Commission [hereinafter TCSC] for employment with the Toledo Police Department: (1) The November, 1972 Patrolman's examination; (2) The January, 1974 Policewoman's examination; (3) The July 5, 1975 Patrol Officer's examination; and (4) The January 15, 1975 Patrol Officer's examination. Plaintiff Harless has never been offered employment with the Toledo Police Department. Plaintiff Harless is a proper representative of the class previously defined by the Court, and the requirements of Rules 23(a) and 23(b)(2) have been met.

2. The Defendant, City of Toledo, is a Municipal Corporation, with a City Charter, organized and existing pursuant to the laws of the State of Ohio. The Toledo Police Department [hereinafter TPD] is a Department of the Defendant City of Toledo.

3. Defendants are the principal officials of the City of Toledo charged with operation of the TPD and with responsibility for its hiring and assignment practices.

4. Title VII of the Civil Rights Act of 1964 was amended on March 24, 1972, to extend to government agencies and other political subdivisions.

5. Up to and through March 24, 1972, only twelve (12) females were employed in entry level classifications of the TPD. The profile of the TPD from 1965 to 1975 was as follows:

Year	Male Police Officers	Female Police Officers	Policewomen
1965	535	0	4
1966	589	0	4
1967	572	0	4
1968	659	0	4
1969	718	0	4
1970	744	0	4
1971	718	0	4
1972	697	0	4
1973	709	0	6
1974	720	1	4
1975	717	1	4

On June 8, 1976, thirty-six (36) persons were hired as patrol officers by the TPD: Twenty-nine (29) males and seven (7) females.

6. Between May 22, 1965, and March 24, 1972, three hundred and seventy-two (372) males were appointed to the TPD. No females were appointed during that period.

7. At all times prior to November 18, 1974, the TPD maintained two separate entry level job classifications for male and female officers on the TPD. These two separate

entry level job classifications were: (1) Patrolman; and (2) Policewoman.

8. Prior to November 18, 1974, females employed in the entry level classification of Policewoman were not permitted assignment to patrol duty, but rather were assigned to the Crime Prevention Bureau/Juvenile Section. Males employed in the entry level job classification of Patrolman were not so channeled.

9. Prior to December, 1976, women employed in the entry level job classification of Policewoman were prohibited, by the Charter of the City of Toledo, the Toledo Civil Service Commission Rules and the Collective Bargaining Agreement in effect between the City of Toledo and the Police Organizations, from permanently transferring outside the Crime Prevention Bureau/Juvenile Section.

10. Prior to December, 1976, women employed in the entry level job classification of Policewoman were prohibited, by the Charter of the City of Toledo, the Toledo Civil Service Commission Rules and the Collective Bargaining Agreement in effect between the City of Toledo and the Police Organizations, from serving in uniform patrol, from which promotions to divisions and to supervisory ranks are made.

11. No Patrolman or Policewoman were appointed to the TPD between 1969 and 1972 due to financial difficulties, and consequently, the TPD was seriously understaffed in 1972.

12. On or about March 1, 1972, and continuing thereafter, the TPD, through the TCSC, announced an open recruitment examination for the entry level job classification of "Patrolman" on the TPD. That announcement was directed at "* * * able ambitious young men who desire

a worthwhile career in the professional police field." (Plaintiffs' Exhibit 5.)

13. The March 1, 1972 announcement for the open recruitment examination for the entry level job classification of "Patrolman" resulted in 281 applicants, of which 0 were women.

14. On or about June, 1972, the TCSC began administering an open recruitment examination for the entry level job classification of "Patrolman" on the TPD. That examination was cancelled by the TCSC on or about July 26, 1972, because of the questionable validity of the selection procedure under certain guidelines issued by the Equal Employment Opportunity Commission in March of 1972.

15. On or about August 4, 1972, the case of *Sarabia v. Duck*, No. C 72-263, was filed in the Western Division of the Northern District of Ohio, challenging the TPD selection process on behalf of a class composed of black and hispanic persons.

16. On or about September 7, 1972, the TPD, through the TCSC, again announced an open recruitment examination for the entry level job classification of "Patrolman" on the TPD. That announcement was directed at "* * * able ambitious young men who desire a worthwhile career in the professional police field." (Plaintiffs' Exhibit 4.)

17. The TPD and its agents recruited minorities, but not including women, to participate in the provisional Patrolman's selection process.

18. On or about October 16, 1972, the TPD appointed a provisional Patrolman's class consisting of forty-three (43) males and zero (0) females. There were, however, two females appointed to a provisional class of policewoman. Provisional appointments were subject to the

provisional appointees' successful completion of a subsequent Civil Service examination.

19. Although the September 7, 1972 announcement of an open recruitment examination for the entry level job classification of Patrolman on the TPD was expressly directed to only "able ambitious young *men*", women were permitted to register to take the Patrolman's examination.

20. In total, there were three hundred and forty-seven (347) applications for the November, 1972 Patrolman's examination. Twenty-two percent (22%) of the applicants were blacks or hispanics, while six percent (6%) of the applicants were women.

21. The November, 1972 Patrolman's examination was developed for the TPD by the TCSC in conjunction with Dr. Kenneth Alvarez, an Industrial Psychologist experienced in the police selection area, as an "interim examination", pending receipt of funding through the Law Enforcement Assistance Administration for the further development of such an examination. At the time formulation of the 1972 examination began, there were no Patrolman exams available which were known to have predictive validity. In addition, the absence of a performance evaluation process within the TPD made it impossible to measure the predictive validity of a test. Therefore, the TCSC, with Dr. Alvarez, attempted to formulate an exam that would be content and construct valid.

22. To develop the November, 1972 Patrolman's examination, the TCSC, in conjunction with Dr. Alvarez, prepared a "job analysis" of the police officer's position in the TPD. The job analysis was prepared through observation and interviews.

23. The November, 1972 Patrolman's examination consisted of three parts: 1) a written, mental abil-

ities test; 2) a physical agility test; and 3) a structured oral interview.

24. The written portion of the exam was designed to measure verbal and reasoning skills required for the position of Patrolman. Two general intelligence tests were administered: 1) the Otis-Lennon Mental Ability Test, Advanced Level; and 2) the IPAT Culture Fair Test, Scale 2. The plaintiffs do not dispute the construct validity of the written exam.

25. The written portion of the examination was graded on a pass fail basis and was not used to rank the applicants. Of the two hundred and eighty-one (281) persons who took the exam, two hundred and sixty-three (263) were males and eighteen (18) were females. There was no statistically significant difference between the performances of men and women on the written portion of the November, 1972 Patrolman's examination.

26. To formulate the physical agility portion of the exam, the TCSC observed the day-to-day activities of patrolmen and attempted to select a test that would be content and construct valid. The test administered was borrowed from "Philadelphia, Pennsylvania's Battery for Policeman and Fireman." The same test was used by several other Ohio cities during that time period. The test administered consisted of the following:

a) push-ups	15 required
b) sit-ups	25 required
c) standing broad jump	6 feet required
d) obstacle course	25 seconds required

An applicant was required to successfully complete three out of four of these requirements in order to qualify for the structured interview portion of the November, 1972 Patrolman's examination. Fifty-nine percent (59%) of the

seventeen (17) females taking the physical agility test failed, while four and one-half percent (4.5%) of the two hundred and forty-six (246) males taking the test failed. This represents a statistically significant difference.

27. The structured oral interview portion of the November, 1972 Patrolman's examination consisted of approximately thirty (30) questions posed to each applicant, which were designed to determine an applicant's communication skills, decision making and problem solving skills, and reactions to stress situations. Applicants' answers were scored by a team of interviewers according to their "degree of correctness." The results of the structured oral interview portion of the exam were used as the sole basis for ranking the applicants on the eligibility list. Forty-three percent (43%) (three (3) out of seven (7)) of the females participating in the structured oral interview portion of the exam failed, while fifteen percent (15%) of the males (thirty-six (36) out of two hundred and thirty-six (236)) failed that portion of the exam. This is a statistically significant difference.

28. On all portions of the November, 1972 examination, seventy-seven percent (77%) (fourteen (14) out of eighteen (18)) of the females taking the examination failed, while twenty-two percent (22%) (sixty-four (64) out of two hundred and sixty-three (263)) of the males taking the exam failed. This is a statistically significant difference.

29. As a result of the November, 1972 Patrolman's examination, two hundred and three (203) persons were placed on an eligibility list; one hundred and ninety-nine (199) males, and four (4) females. The four (4) females placed on the eligibility list were ranked 86, 116, 126 and 184 on the list.

30. The females ranked number 86 and number 116 on the November, 1972 examination were certified to the TPD by the TCSC for appointment.

31. As a result of the November, 1972 examination, ninety-six (96) persons were hired by the TPD: ninety-five (95) males were hired as Patrolman; and one (1) female was hired as a Patrolman.

32. The female who was ranked number 116 on the eligibility list, Plaintiff Vivien Butts, was certified to the TPD and was interviewed by the Selection Board, but was not hired. The reasons given for not appointing Ms. Butts, who is black and therefore also a member of the class in *Sarabia v. Duck,* was the adverse criticism of her supervisors in the Police Aide Program and her poor attitude during her interview. The Court finds that the grounds for non-selection of Plaintiff Butts were valid and not pretextuous.

33. On or about July 10, 1973, the TPD through the TCSC, announced an open recruitment examination for the entry level job classification of "Policewoman" on the TPD. That announcement was directed at "able ambitious young women who desire a worthwhile career in the professional police field."

34. As a result of the open recruitment examination for the entry level job classification of Policewoman on the TPD administered in January, 1974, one hundred and twenty-eight (128) females were certified to an eligibility list on March 6, 1974.

35. Although Chief of Police Corrin McGrath interviewed approximately ten (10) women off the eligibility list established from the 1974 Policewoman's examination, no women were appointed from that list, as either Policewomen or Patrolman, due to a lack of funding.

36. On or about November 18, 1974, the TPD through the TCSC, abolished the entry level job classifications of Patrolman and Policewoman for purposes of future hiring of officers on the TPD. Those entry level job classifications were replaced by the entry level job classification of Patrol Officer. However, women employed at that time in the entry level job classification of Policewoman did not have their job classifications changed to Patrol Officer until April, 1976.

37. On or about November 18, 1974, the TPD through the TCSC, announced an open recruitment examination for the entry level job classification of Patrol Officer on the TPD. That announcement was directed at both men and women.

38. In December, 1974, the TPD began a campaign to recruit all segments of the population to take the July 5, 1975 Police Patrol Officer's examination, especially blacks, hispanics and women.

39. On July 5, 1975, the TPD, through the TCSC, gave a test for Police Patrol Officer.

40. Twenty-two percent (22%) (two hundred and seventy-three (273) of one thousand two hundred and forty-one (1,241)) of the applicants who attended the July 5, 1975 Police Patrol Officer's examination were females. Nineteen and four-tenths percent (19.4%) of the thirty-six (36) persons actually appointed to the TPD as a result of the July 5, 1975 Police Patrol Officer's examination were females.

41. The July 5, 1975 Police Patrol Officer's examination was a validated examination and did *not* have a statistically significant disparate impact on females.

42. On July 25, 1975, plaintiffs' herein Motion for Intervention in the case of *Sarabia v. Duck, supra,* was denied.

43. Pursuant to a Court Order entered on October 6, 1975, in the case of *Sarabia v. Duck, supra,* all black and hispanic applicants who passed the July, 1975 Police Patrol Officer's examination were certified and interviewed for appointment to the TPD. Women, as a class, were not certified and/or interviewed for appointment.

44. To the time of trial, no female has ever been permanently assigned to the:

1) Detective Bureau;
2) Human Relations Bureau;
3) Planning and Research Bureau;
4) Internal Affairs Bureau;
5) Morals Squad;
6) Narcotics Squad;
7) Armory;
8) Property Room;
9) Academy;
10) Traffic Bureau; or
11) Selective Enforcement Squad,

although Police Chief Corrin McGrath testified that women are as qualified as men to serve in those divisions.

45. To the time of trial, only one (1) woman has ever been promoted to the rank of sergeant in the TPD.

46. There was no testimony of discriminatory treatment within the TPD offered by any persons employed therein. Two (2) women employed in the TPD stated, by affidavit and direct testimony, that they had *not* experienced any discriminatory treatment within the TPD.

CONCLUSIONS OF LAW

The Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(3); 42 U.S.C. § 2000e-5(f)(3); and 28 U.S.C. §§ 2201 and 2202.

This action is properly brought as a class action under Rule 23(b)(2), Federal Rules of Civil Procedure, on behalf of a class consisting of all past and present female applicants to the TPD since 1965, and all past and present female employees of the TPD since 1965.

I.

Although the plaintiffs have submitted considerable statistical evidence concerning the employment profile of the TPD from 1920 to the present, the Court considers the pre-1972 conduct of the defendants to have only limited probative value in deciding the outcome of this case. It would belie reality for the Court to find that the hiring and employment practices of the TPD prior to mid-1972 did not intentionally discriminate against women. Indeed, the only logical inference to be drawn from the evidence in the record, most of which has been stipulated to by the parties, is that at least until 1972, the defendants relied upon stereotyped characterizations of the sexes, as well as the preference of co-workers and the public generally, in maintaining separate entry level job classifications for men and women, in employing only a minimal number of women, and in limiting the police functions performed by women employed in the TPD. In doing so, the defendants clearly "intentionally" discriminated against women as a class.[1] And the fact that society in general may have

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1. Because Title VII was not made applicable to municipalities until March, 1972, plaintiffs' challenge to the defendants' pre-1972 policies and practices is brought pursuant to 42 U.S.C.

(Continued on following page)

approved the virtual exclusion of women from police work does not in any way alter the discriminatory character of the defendants' conduct.[2] Nor does it relieve the defendants from liability for any relief necessary and appropriate to remedy such discrimination at the present time. However, because the Court cannot find from the evidence that any of the individually named plaintiffs in the instant case have themselves suffered loss by virtue of the defendants' past discrimination, and because from the evidence adduced at trial the Court has concluded that the defendants are no longer discriminating against women as a class in their employment policies and practices, it is the conclusion of the Court that the plaintiffs are not entitled to the relief they seek.

II.

It is now well established that as to each alleged act of discrimination, the plaintiff has the burden of establishing a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). And it is equally well established that a prima facie case of employment discrimination may be established through the use of statistics. *See E.E.O.C. v. N.Y. Times Broadcasting Ser-*

Footnote continued—

§ 1983. As the United States Supreme Court recently held in *Washington v. Davis*, 426 U.S. 229 (1976), an official act is not violative of § 1983 solely because it has a recially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. Defendants contend that by presenting "only" statistical evidence of sex discrimination, the plaintiffs have failed to prove a discriminatory intent. However, *Davis* expressly recognizes that statistics may be sufficient evidence from which to *infer* discriminatory intent. Moreover, the evidence in this case demonstrates an employment classification system which could have no reasonable purpose other than to intentionally limit the employment opportunities available to women in the TPD. *See Washington v. Davis*, 426 U.S. at 242.

2. *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny have clearly established that popular sentiment is not a legal defense to claims of constitutional deprivation.

vice, Inc., 542 F.2d 356 (6th Cir. 1976); *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976). Once a prima facie case is established, the burden "to articulate some legitimate, non-discriminatory reason" for any demonstrated disparities is shifted to the defendant. 411 U.S. at 802. *Accord E.E.O.C. v. N.Y. Times Broadcasting Service, Inc.*, 542 F.2d 356 (6th Cir. 1976); *Causey v. Ford Motor Co.*, 516 F.2d 416 (5th Cir. 1975).

III.

HIRING PRACTICES

Applying this standard to plaintiffs' claims of hiring discrimination in the instant case, the Court finds that the plaintiffs have established a prima facie case of discrimination by demonstrating, through the use of statistics, a continuing disparity in the level of employment of males and females in the TPD, and by establishing that the defendants maintained separate entry level job classifications for men and women. Thus, it is the defendants' burden to rejoin this prima facie case by showing a legitimate non-discriminatory rationale.

Typically, defendants in sex discrimination cases have attempted to defend their actions by demonstrating that facially discriminatory practices are rooted in either 1) a bona fide occupational qualification, and/or 2) business necessity. *See e.g., E.E.O.C. v. N.Y. Times Broadcasting Service, Inc., supra; Rodriquez v. East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973). *See also* 42 U.S.C. § 2000e-2. In the instant case, however, the defendants have relied on neither the bona fide occupational qualification or business necessity exceptions, but rather assert simply that no discrimination has taken place at all since Title VII was made applicable to municipalities in 1972.

As was noted in *Pond v. Braniff Airways, Inc.*, 500 F.2d 161, 165 (5th Cir. 1974),

> where an employer can demonstrate no discrimination in the selection or advancement of employees, but rather that the employer in the best of faith merely weighed each person's talents then choosing the man over the woman (or the woman over the man), no case is made out under Title VII.

Accordingly, a critical question to be determined in this case is whether the selection processes utilized by the TPD for screening applicants for entry level positions have in fact been non-discriminatory.

SELECTION PROCEDURES
THE 1972 PATROLMAN'S EXAMINATION

For whatever reasons, the record indicates that prior to mid-1972, no women had sought to become patrolmen on the TPD. However, when the TCSC announced an open recruitment examination in September of 1972, twenty-one (21) women made application to take the examination, notwithstanding the fact that the announcement was directed to "able ambitious young *men*." Among the eighteen (18) women actually taking the 1972 exam, which was administered in November, 1972, were Plaintiffs Joyce Harless and Vivian Butts. Said plaintiffs were not hired and now claim that the selection process was discriminatory and in violation of Title VII of the Civil Rights Act of 1964, as amended March 24, 1972.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court held that Title VII forbids the use of employment tests that are discriminatory in effect (without regard to the employer's intent) *unless* the employer can meet its "burden of showing that any given requirement

[has] * * * a manifest relationship to the employment in question." 401 U.S. at 432. *See also Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975).[3] Thus, the Court's review of the selection process utilized by the defendants in November, 1972, requires a two-step analysis. The Court must first determine whether the selection process had a discriminatory effect on females, and secondly, if the first question is answered affirmatively, the Court must determine whether the defendants have proven by a preponderance of the evidence that the selection process had a "manifest relationship" to employment in the TPD.

DISCRIMINATORY EFFECT

Because of the structure of the 1972 exam, it is necessary to evaluate the discriminatory effect of each portion of the exam separately. The parties agree that the written portion of the 1972 examination did *not* have a disproportionate impact on females. However, the parties dispute the impact of both the physical agility and structured interview portions of the exam.

The evidence shows that while 58.8% of the women taking the physical agility portion of the exam failed (and therefore were eliminated from consideration), only 4.5% of the men taking the exam failed. Using a standard deviation of $\frac{+}{-}$ 1, plaintiffs' expert, Dr. Thomas Henderson, found this to be a "highly significant statistical difference." Defendants contend, however, that because only seventeen (17) women took the physical agility portion of the exam (ten (10) of them failed), the sample size is too small to

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3. *See also Douglas v. Hampton,* 512 F.2d 977 (D.C. Cir. 1975); *Vulcan Society v. Civil Service Comm'n,* 490 F.2d 387 (2d Cir. 1973).

allow a finding of statistical significance.[4] While the Court recognizes that a larger sample would be preferable in determining proportional impact, the defendants' own expert, Dr. James King, testified that a cell of five (5) would be adequate for analysis. Since that standard is met in this case, the Court concludes that the physical agility portion of the 1972 examination did have a statistically significant disproportionate impact on women.

With respect to the structured oral interview portion of the 1972 exam, the evidence demonstrates that only fifteen percent (15%) of the men taking the exam failed, while forty-three percent (43%) of the women taking the exam failed. Plaintiffs' expert, Dr. Henderson, testified that this also was a "statistically significant difference." Defendants argue again that the size of the sample (only seven (7) women remained eligible after the written and physical agility portions of the exam) was too small to allow a finding of statistical significance. While the sample was indeed small, Dr. Henderson testified that the chance of this difference resulting without any *true* difference is one in twenty, a probability which is deemed "statistically significant" by the Employment Opportunity Commission Guidelines on Employee Selection Procedures. 29 C.F.R. § 1607.5(c) (1975). Therefore, the Court finds that the structured oral interview portion of the 1972 exam did have a statistically significant disproportionate impact on women.

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4. Defendants rely on the case of *Ochoa v. Monsanto*, 473 F.2d 318 (5th Cir. 1973), wherein the court held that, on the facts of that case, a sample of only eleven (11) minorities would not compel the district court to set in train the usual presumptions arising from statistical disparities.

VALIDATION

The Court having found that both the physical agility and structured oral interview portions of the 1972 examination had a disproportionate impact on women, it remains to determine whether the defendants have carried their burden of establishing that those portions of the examination bore a "manifest relationship" to the job of patrolman.

Three techniques for testing the validity of selection procedures have been judicially and professionally approved.[5] The method of validation preferred by most courts is criterion-related validity, or empirical validity, which includes predictive and concurrent methods of validation. Predictive validation consists of comparison between the examination scores and subsequent job performances of those applicants who are hired. If there is sufficient correlation between test scores and job performance, the examination is considered to be valid. Concurrent validation requires the administration of the examination to a group of current employees and a comparison between their relative scores and relative performance on the job. Both predictive and concurrent validation require that the employer have a reliable performance evaluation procedure, which the TPD does not have.

Construct validity and content validity are also professionally recognized techniques for proving the job-relatedness of a selection process. Construct validity is

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5. The Guidelines on employment testing promulgated by the Equal Employment Opportunity Commission, 29 C.F.R. § 1607.5 (1975), adopt, by reference, the "Standards for Educational and Psychological Tests and Manuals" published by the American Psychological Association (APA). The courts have almost unanimously agreed that the APA guidelines provide persuasive standards for evaluating claims of job-relatedness. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Douglas v. Hampton*, 512 F.2d 977 (D.C. Cir. 1975); *Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387 (2d Cir. 1973).

proven when an examination is structed to determine the degree to which applicants possess identifiable characteristics that have been determined to be important to successful job performance. Content validity is established when the content of the test closely approximates the tasks to be performed on the job by the applicant.

To sustain their burden, the defendants must demonstrate that the 1972 exam was valid under one of these accepted standards.[6].

PHYSICAL AGILITY

Although the defendants admit that there is no *empirical* evidence to support the validity of the physical agility portion of the exam, they nonetheless argue that said test was both "construct" and "content" valid. Defendants' expert, Mr. David Boston of the TCSC, testified that in preparing the test the staff observed the kinds of physical activities required of patrolmen. According to Mr. Boston, it was the opinion of the designers of the physical agility exam that the obstacle course requirement was con-

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6. Some courts have questioned whether a mere showing of content and/or construct validity, absent evidence of criterion-related validity, is sufficient to demonstrate that a selection process which has a disproportionate impact on a protected class bears a substantial relationship to job performance. *See, e.g., Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975); *Fowler v. Schwarzwalder*, 351 F. Supp. 721 (D. Minn. 1972); *Pennsylvania v. O'Neil*, 348 F. Supp. 1084 (E.D. Pa. 1972), *aff'd in relevant part*, 473 F.2d 1029 (3d Cir. 1973). *However, this Court reads Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975), to require only a demonstration of job-relatedness under *any* of the professionally accepted validation techniques. *Accord Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387 (2d Cir. 1973). *See also Washington v. Davis*, 426 U.S. 229, 247 (1976). And certainly where, as in the instant case, the evidence demonstrates the existence of circumstances rendering both concurrent productive validation impracticable, reliance on content and construct validity measures is not improper. For an excellent discussion of the difficulties presented by predictive and concurrent validation studies, *see Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387, 395 n. 10 (2d Cir. 1973).

tent valid in that it approximated tasks performed on the job by patrolmen, and that the broad jump, sit-up, and push-up requirements were construct valid in that they tended to measure strength and coordination, characteristics observed to be important in successful performance of the job of Patrolman.

Plaintiffs concede that some minimum level of physical ability is required in patrolmen. And plaintiffs' expert, Dr. Henderson, did recognize that strength is a construct important to police work, and further recognized that push-ups, sit-ups and a standing broad jump would "tend" to show strength. Dr. Henderson nonetheless disagreed with Mr. Boston's conclusion that the physical agility portion of the 1972 exam had construct validity for the reason that in his opinion there was no evidence that the levels required for each physical activity were predictive of the strength required to be a police officer.

Dr. Henderson's opinions notwithstanding, it is the opinion of the Court that the defendants have carried their burden of demonstrating that the physical agility portion of the 1972 exam was reasonably related to job performance. Having recently eliminated both height and weight requirements, it was essential that a physical agility requirement be included in the selection process, and the evidence shows that the defendants took all steps possible to locate an appropriate examination.

STRUCTURED ORAL INTERVIEW

Defendants offered evidence by way of expert testimony, supplemented by statistical documentation, to demonstrate that the structured oral interview portion of the 1972 exam had both construct and content validity, and also had criterion validity as measured against Police Academy performance. Defendants' expert, Mr. Boston, testi-

fied that the structured oral interview portion of the exam, which consisted of hypothetical questions simulating situations likely to be encountered by patrolmen, measured several dimensions identified through the job analysis that would differentiate between persons who would be better police officers if put in a position to perform patrol functions. In addition, a study of the results of the structured oral interview portion of the 1972 examination, introduced into evidence as Plaintiffs' Exhibit 18, indicates that a significant relationship existed between performance in the structured interview and performance at the Police Academy.

The Court finds this evidence of training program validation, together with the expert testimony of Mr. Boston regarding the content and construct validity of the exam, sufficient to satisfy the defendants' burden of demonstrating that the structured oral interview portion of the exam was manifestly related to job performance. In reaching this conclusion, the Court relies on the language of 29 C.F.R. § 1607.5(3) (1975), as well as the Supreme Court's recent discussion of employment selection tests in *Washington v. Davis,* 426 U.S. 229, 250-51 (1976), by analogy.

The defendants having met their burden of establishing that the 1972 exam was job related, it remains for the Court to consider whether the plaintiffs have demonstrated that other selection devices were available to the defendants which would have served the defendants' interest in securing capable patrol officers but which would not have had a disproportionate impact on women. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975), *citing McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). In this regard, plaintiffs introduced a study of the 1972 Patrolman's examination which indicates that

while the structured oral interview was a valid predictor of overall Academy performance, the two written intelligence tests administered (which did not have a disproportionate impact on women) were a better predictor.

If the evidence of the circumstances surrounding the formulation of the 1972 examination was somewhat different the Court might be inclined to construe these facts as evidence that the test given in 1972 was used merely as a "pretext" for discrimination against women. However, it is undisputed that both the physical agility and structured oral interview portions of the exam were designed in response to the defendants' recognition[7] that they could no longer impose a height and weight requirement as a measure of physical ability, and could no longer rely exclusively on certain intelligence tests as selection criteria, due to the disproportionate impact these criteria were known to have on black and hispanic minorities. The testimony of David Boston indicates that the defendants went to considerable length to develop a non-discriminatory interim examination which could be used to select a police class as quickly as possible in order to alleviate the City's then critical police shortage. At the same time, the City sought federal funding for the development of a validated examination for future use. While subsequent developments in the art of testing may have demonstrated deficiencies in the interim examination which would make it suspect if used today, in light of

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7. David Boston testified that due to the 1972 amendment of Title VII, extending its scope to include municipalities, and due to the August, 1972 filing of *Sarabia v. Duck, supra*, a class action brought on behalf of blacks and hispanics, the defendants became increasingly sensitive to the need to formulate a demonstrably non-discriminatory selection process. However, Mr. Boston further testified that at that time (1972), very little research had been done in the area of public employment testing, and no validated exams were available. Mr. Boston's testimony on this point was verified by plaintiffs' expert, Dr. Henderson.

the evidence adduced at trial, the Court concludes that the 1972 Patrolman's examination was a valid interim examination, *see* 29 C.F.R. § 1607.9 (1975), and did not deprive the plaintiffs of their rights under Title VII.

THE 1974 PATROL OFFICER'S EXAMINATION

Approximately two hundred and seventy-three (273) women participated in the 1974 Patrol Officer's examination (which was actually administered in July, 1975), including plaintiffs Joyce Harless, Vivian Butts, Anne Hyatt, Pam Mercer, Ann Smith, Cherie Gilford, Marsha Habryck and Sarah Feiklowicz. Women were actively recruited to take the 1974 examination, which was a validated examination and did not have a statistically significant impact on women. Twenty-two percent (22%) of the applicants were women, and nineteen and four-tenths percent (19.4%) of the persons hired were women.

Nonetheless, the plaintiffs herein, who were not among those appointed, claim discrimination on the grounds that by reason of a Court Order of Judge Don J. Young in the case of *Sarabia v. Duck, supra,* all black and hispanic individuals who passed the 1974 examination were certified to the appointment list, while female applicants as a class were not so certified. The plaintiffs herein did move to intervene in *Sarabia,* but that motion was denied by Judge Young.

Thirty-six (36) persons were to be hired from the results of the July, 1975 examination, and therefore, under the normal procedures of the TCSC, a list of ninety-six (96) persons would have been certified to the TPD from which the Chief of Police could make the appointments. However, because of the Court Order in *Sarabia,* the certification list was expanded to one hundred and twenty-five (125) persons by adding "all minority individuals

who qualify for appointment as police patrol officers by having successfully passed [the] examination." The term "minority individuals" was construed to mean blacks and hispanics, but not women.

Although the face of the Order in *Sarabia* may appear to discriminate against women (as well as white males), a review of the actual appointments made from the certification list indicate that none of the persons added to the list by virtue of Judge Young's Order were actually appointed to the TPD. While Plaintiffs' Exhibit 65 reveals that among the ninety-six (96) persons originally certified some men were appointed with lower scores than those of Plaintiffs Gilford and Hyatt, it also reveals that some women were appointed with scores lower than those of men who were not appointed.

As noted above, the percentage of women appointed on the basis of the 1975 selection process closely approximates the percentage of women in the applicant class. Accordingly, the Court finds that the July, 1975 selection process was non-discriminatory and therefore not violative of the plaintiffs' rights under Title VII.

For the reasons stated above, the Court concludes that the defendants have met their burden of establishing that the selection procedures utilized by the TPD since 1972 have been substantially job related and non-discriminatory. The plaintiffs' failure to gain appointment to the TPD has resulted only from their own inability to perform sufficiently well in the selection process to merit appointment. Therefore, the Court concludes that Plaintiffs Harless, Butts, Hyatt, Mercer, Smith, Gilford, Habryck and Feiklowicz have failed to prove that either they individually, or the class they represent, have been discriminated against by the defendants' hiring practices since 1972.

IV.

INTERNAL EMPLOYMENT PRACTICES

Plaintiffs herein have also alleged discrimination in the internal employment practices of the defendants. Specifically, plaintiffs allege that the defendants have discriminated against women in the TPD by maintaining separate entry level job classifications for men and women until November, 1974, by failing to change the classification of all policewomen to patrol officer until April, 1976, and by limiting women hired into the entry level job classification of policewoman to duties in the Crime Prevention Bureau/Juvenile Section as late as December, 1976.

Such practices obviously accorded women treatment different from that accorded men and can only be based on stereotype characterizations of the sexes. Indeed, the defendants have made no effort to demonstrate that the prior classification system was rooted in either bona fide occupational qualifications or business necessity. Police Chief McGrath himself testified that he knew of no reason why women could not serve in any division or bureau of the TPD, including uniform patrol. The only defense offered by the defendants for their failure to move more expeditiously to remove the limitations on the assignments available to women classified as policewomen was the existence of collective bargaining agreements which were construed to bar the transfer of policewomen into units other than the Crime Prevention Bureau/Juvenile Section. However, as was noted in *Afro-American Patrolmens League v. Duck*, 503 F.2d 294 (6th Cir. 1974), the "provisions of [a] collective bargaining contract must give way to the constitutional requirement of equal protection."

Had any of the women now employed in the TPD, who presumably are the persons injured by the defendants' delay in removing the vestiges of sex discrimination from

its employment practices, come forward to testify in this case, the Court could well have fashioned appropriate relief. However, such testimony is conspicuously absent from the record of this case. There is no evidence that any of the women on the force, in either the policewoman or patrol officer classifications, have ever sought and been denied assignment to a particular division. Nor is there any testimony in the record to indicate that the women in the TPD were dissatisfied with their assignments to the Crime Prevention Bureau/Juvenile Section.

V.

RELIEF

In light of this record, and due to the fact that the evidence indicates that as of the date of trial the TPD no longer maintains any classifications or practices and procedures which discriminate on the basis of sex, and that the defendants are now actively recruiting women into the TPD, the Court concludes that neither injunctive nor declaratory relief would serve a useful purpose at this time. However, because of the Court's findings of past discrimination, in some cases only recently remedied, the Court deems it appropriate to maintain continuing jurisdiction over this case so that swift action may be taken if any instances of "backsliding" occur.

Therefore, it is

ORDERED that the plaintiffs in this action shall take nothing, that neither declaratory nor injunctive relief shall issue at this time, but that the Court will maintain continuing jurisdiction over this action for a period of six months ending October 7, 1977.

/s/ NICHOLAS J. WALINSKI
United States District Judge

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed September 30, 1977)

Civil Action File No. C 74-296

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

JOYCE HARLESS, *et al.*

VS.

ROBERT DUCK, *et al.*

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Nicholas J Walinski, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiffs in this action shall take nothing, that neither declaratory nor injunctive relief shall issue at this time, but that the Court will maintain continuing jurisdiction over this action for a period of six months ending October 7, 1977. Complaint dismissed.

/s/ NICHOLAS J. WALINSKI
United States District Judge

CONSTITUTION OF THE UNITED STATES
AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support

the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2000e

SUBCHAPTER VI.—EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions

For the purpose of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seek-

ing to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

§ 2000e-1. Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

§ 2000e-2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or

other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any

individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to dis-

criminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Businesses or enterprises extending preferential treatment to Indians

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion,

sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

§ 2000e-3. Other unlawful employment practices—Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Printing or publication of notices or advertisements indicating prohibited preference, limitations, specification, or discrimination; occupational qualification exception

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause

to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

29 C.F.R. 1607

PART 1607—GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

§ 1607.1 Statement of purpose.

(a) The guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.

(b) An examination of charges of discrimination filed with the Commission and an evaluation of the results of the Commission's compliance activities has revealed a

decided increase in total test usage and a marked increase in doubtful testing practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for classes protected by title VII may result in the rejection of many who have necessary qualifications for successful work performance.

(c) The guidelines in this part are designed to serve as a workable set of standards for employers, unions and employment agencies in determining whether their selection procedures conform with the obligations contained in title VII of the Civil Rights Act of 1964. Section 703 of title VII places an affirmative obligation upon employers, labor unions, and employment agencies, as defined in section 701 of the Act, not to discriminate because of race, color, religion, sex, or national origin. Subsection (h) of section 703 allows such persons "* * * to give and to act upon the results of any professionally devel-

oped ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

§ 1607.2 "Test" defined.

For the purpose of the guidelines in this part, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

§ 1607.3 Discrimination defined.

The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

§ 1607.4 Evidence of validity.

(a) Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate § 1607.3. Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

(b) The term "technically feasible" as used in these guidelines means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

(c) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that

candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion in validating employment tests only when there is a high probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from more than one company in the same industry. Both in this instance and in the use of data collected throughout a multiunit organization, evidence of validity specific to each unit may not be required: *Provided,* That no significant differences exist between units, jobs, and applicant populations.

§ 1607.5 Minimum standards for validation.

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street NW., Washington, D.C. 20036. Evidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job

analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job.

(b) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approached in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure

that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of tests and test manuals, including instructions for administration, scoring, and interpretation of test results, that are privately developed and/or are not available through normal commercial channels must be included as a part of the validation evidence.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisor's prejudice, as when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

(5) Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on

other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question. (See § 1607.9). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups.

(c) In assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against one component of job performance.

(2) In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available;

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis

of the test, the higher the relationship needs to be between the test and a criterion of job success for the test to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

§ 1607.6 Presentation of validity evidence.

The presentation of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior. (See § 1607.5(c) concerning assessing utility of a test.) Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test or the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the minimum acceptable cutoff (passing) score on the test must be reported. It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

§ 1607.7 Use of other validity studies.

In cases where the validity of a test cannot be determined pursuant to § 1607.4 and § 1607.5 (e.g., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to significantly affect validity. Any person citing evidence from other validity studies as evidence of test validity for his own jobs must substantiate in detail job comparability and must demonstrate the absence of contextual or sample differences cited in paragraphs (a) and (b) of this section.

§ 1607.8 Assumption of validity.

(a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonempirical or ancedotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

§ 1607.9 Continued use of tests.

Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a specific setting is practicable and required but not yet obtained, the use of the test may continue: *Provided*: (a) The person can cite substantial evidence of validity as described in § 1607.7 (a) and (b); and (b) he has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

§ 1607.10 Employment agencies and employment services.

(a) An employment service, including private employment agencies, State employment agencies, and the U.S. Training and Employment Service, as defined in section 701(c), shall not make applicant or employee appraisals or referrals based on the results obtained from any psychological test or other selection standard not validated in accordance with these guidelines.

(b) An employment agency or service which is requested by an employer or union to devise a testing program is required to follow the standards for test validation as set forth in these guidelines. An employment service is not relieved of its obligation herein because the test user did not request such validation or has requested the use of some lesser standard than is provided in these guidelines.

(c) Where an employment agency or service is requested only to administer a testing program which has

been elsewhere devised, the employment agency or service shall request evidence of validation, as described in the guidelines in this part, before it administers the testing program and/or makes referral pursuant to the test results. The employment agency must furnish on request such evidence of validation. An employment agency or service will be expected to refuse to administer a test where the employer or union does not supply satisfactory evidence of validation. Reliance by the test user on the reputation of the test, its author, or the name of the test shall not be deemed sufficient evidence of validity (see § 1607.8(a)). An employment agency or service may administer a testing program where the evidence of validity comports with the standards provided in § 1607.7.

§ 1607.11 Disparate treatment.

The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard—even though validated against job performance in accordance with the guidelines in this part—cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership opportu nities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been

granted the opportunity to qualify under less stringent selection standards previously in force.

§ 1607.12 Retesting.

Employers, unions, and employment agencies should provide an opportunity for retesting and reconsideration to earlier "failure" candidates who have availed themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment procedure claims more education or experience, that individual should be retested.

§ 1607.13 Other selection techniques.

Selection techniques other than tests, as defined in § 1607.2, may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being of the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

§ 1607.14 Affirmative action.

Nothing in these guidelines shall be interpreted as diminishing a person's obligation under both title VII and Executive Order 11246 as amended by Executive Order 11375 to undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, the use of tests which have been validated pursuant to these guidelines does not relieve employers, unions or employment agencies of their obligations to take positive action in affording employment and training to members of classes protected by title VII.

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No. 80-86

In the Supreme Court of the United States

October Term, 1980

ROBERT DUCK, *et al.*,
Petitioners,

vs.

JOYCE HARLESS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

Respondents accept the Statement of the Case appearing in the Petition for Writ of Certiorari as substantially correct. There are certain facts, however, that were either not stated or misstated by Petitioners. These facts are enumerated below.

I. The Petitioners failed to point out that the District Court found Petitioners had intentionally discriminated against women prior to March 24, 1972, the date Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e) et seq. was made applicable to municipalities (Pet. App. 24); and, this finding was left undisturbed by the Sixth Circuit. This finding was based on three of Petitioners' employment practices: (1) the maintenance of separate entry level job classification for men and women; (2) the employment of only a minimal number of women; and (3) the limitation on police functions performed by women (Pet. App. 4-5).

II. The District Court found disparity in the level of employment of male and female police officers after 1972 (Pet. App. 26). Two portions of the 1972 patrolman's examination were found to have a significantly disparate impact between male and female applicants. Those portions were the physical agility test and the structured oral interview (Pet. App. 29).

III. The Sixth Circuit found the physical agility test the major flaw with the 1972 examination (Pet. App. 7). In holding that the Petitioners failed to meet their burden of showing the test valid and job-related the Court found four defects. First, despite the recognition that some physical activity was identified as necessary to the job of police officer, Petitioners offered no definition of the amount of physical strength or extent of physical exertion required. Second, the test had never been validated by any of the cities who then used it, nor did the Petitioners attempt to do so until 1974. Third, the record lacked any justification for the types of exercises chosen or passing marks for each exercise. Fourth, when the test was omitted from later examinations the record disclosed no detrimental effect on the police department (Pet. App. 7-8).

IV. The structured oral interview was also found not to be job-related. The interview was flawed due to a lack of standardized conditions, rater bias, and a lack of criteria on which to judge the degree of correctness of an applicant's answers (Pet. App. 8). Further, the Court rejected the Petitioners' attempt to validate the structured oral interview based on its having some correlation with performance at the police academy as Petitioners' own expert found reason to question the existence of a relationship between success in training and success on the job (Pet. App. 8).

V. The Sixth Circuit found two tests that did not have a disparate impact between male and female applicants and were better bases for employee selection (Pet. App. 9). Those tests were biographical data and written intelligence tests.

VI. Both lower courts found the Petitioners' internal employment practices were discriminatory (Pet. App. 5-6, 37). It must be pointed out that Petitioners did not rely on either a bona fide occupational qualification or business necessity; rather, they maintained throughout that they did not discriminate subsequent to March 24, 1972. The undisputed facts, however, show: (1) separate entry level job classifications were maintained for men and women until November of 1974; (2) policewomen hired prior to November of 1974 were not changed to the classification of patrol officer until April of 1976; (3) women were limited to the Crime Prevention Bureau/Juvenile Section as late as December of 1976 being denied transfer into other departments having greater promotional opportunities (Pet. App. 5-6).

VII. The Sixth Circuit remanded the case for trial on an appropriate remedy including attorney's fees.

REASON WHY THE WRIT SHOULD BE DENIED

Petitioners seek this Court's review of five questions. Petitioners do not claim any conflicts exist, rather they assert, without argument, that the questions presented are important. However, none of the questions are of sufficient importance to warrant review by this Court. More importantly, the questions are not raised by either the decision or record below and are not properly before this Court. Taking the questions in the order in which the Petitioners present them, it is evident the Petition should be denied.

Grace Period

Petitioners' first question, which asks whether municipalities are entitled to a grace period during which time employment practices can be brought into compliance with Title VII, does not warrant review by this Court.

This question was not raised in the courts below as Petitioners did not defend any of their discriminatory practices as necessary to a program of gradual compliance. The Petitioners did not begin a plan of compliance in 1972. The record indicates that the discriminatory practices of separate entry level classifications continued until late in 1974. The permanent assignment of female employees to but one department having fewer promotional opportunities continued at least until December of 1976. Therefore, the question of a grace period for municipalities acting with "deliberate speed" to conform to the mandate of Title VII was not decided by the Sixth Circuit and is not raised by the record.

Even if raised, the question does not warrant review as no conflict exists over its resolution and it lacks importance. The unstated premise in Petitioners' assertion of the question's importance is that municipalities have relied on the assumption of such a grace period. Given that 42 U.S.C. section 1983 prohibited discriminatory conduct under color of state law long before March 24, 1972, the proposition that municipalities have detrimentally relied upon a grace period, or are justified in needing one, is absurd. Further, the fact that Title VII has been applicable to public employees for more than eight years undercuts the question's continued importance.

Moreover, there is nothing in the 1972 amendments of Title VII to suggest Congress intended to permit public employers to delay compliance. The inference that Con-

gress deliberately withheld any grace period is supported by the express grant of a one year grace period to private employers in 1964, Title VII of the Civil Rights Act of 1964, Pub. L. No. 86-352 section 716(a), 78 Stat. 259 (1964), and a failure to grant public employers a similar grace period in 1972.

The Physical Agility Test

Petitioners' second question is whether the Petitioners had to identify the exact amount of strength necessary to be a police officer to justify testing job applicants with a physical agility test that had a disparate impact on women. Again, Petitioners have failed to demonstrate any grounds for this Court's review.

This question is not raised by the decision below. The Sixth Circuit did not find the Petitioners failed to meet their burden of showing the validity of this test solely because they failed to identify the exact amount of strength necessary to be a police officer. The physical agility test was lacking in several respects. First, it was not shown to be the best test then available. It had never been validated and Petitioners did not begin to determine its validity until 1974. Second, no justification for the types of exercises chosen nor the passing marks for each was offered. Third, no detrimental effect on the police department was shown to occur when the test was deleted from subsequent exams.

Even if the lower court had rested its determination solely upon the Petitioners' failure to identify the amount of strength required of police officers, there is no question warranting this Court's review. This Court's own prior decision in *Dothard v. Rawlinson*, 433 U.S. 321 (1977) is controlling.

In *Dothard* this Court found the employer failed to rebut a prima facie case of discrimination by validating a height and weight requirement for the position of correctional counselor. The Court held the requirement invalid not because height and weight do not tend to measure strength, but because there was no showing that the height and weight required related to "the requisite amount of strength thought essential to good job performance". *Id.* at 321. Nothing in the opinion, however, suggests a test which measured strength directly would be valid without a determination of the amount of strength required.

The Sixth Circuit was correct in reading *Dothard* as requiring some determination of the amount of physical strength or extent of physical exertion required. The result reached seems particularly just when it is noted that up until the time of the trial the Petitioners did not evaluate job performance nor require on-going physical fitness of police officers.

Moreover, the determination by this Court of the validity of this test is not sufficiently important for review. The question turns on the particular facts of this examination, the exercises and passing marks for each. Its resolution is of no value outside this narrow context.

Pre-1972 Discrimination

The third question also does not warrant the Court's review. It concerns the probative value of discriminatory acts occurring prior to the amendment of Title VII making the act applicable to public employers.

This question, too, is not raised by the decision below. Although the opinion below contains language to the effect that pre-Act discrimination was very probative, the court did not rely on evidence of discrimination prior to 1972.

It finds specific acts of discrimination occurring five years after the 1972 amendment of Title VII.

The Structured Interview

Petitioners' fourth question arises out of the Sixth Circuit's finding the structured oral interview was not job-related. This Court is asked to decide whether it is permissible for a City to test applicants for identified characteristics necessary for successful completion of a job-training program or must they test identified characteristics necessary for job performance. Once again Petitioners seek this Court's review of a claimed error not squarely presented by the decision below without explanation of why the question merits review.

The Sixth Circuit did not find the structured oral interview invalid solely because it was an indication of police academy performance. The Court noted Petitioners' own expert questioned the relationship between academy performance and good job performance. Further, the method of conducting the test was suspect as there was evidence of a lack of standardized conditions, rater bias and a lack of criteria on which to judge the degree of correctness of an applicant's answers.

Even if the Sixth Circuit had rested its invalidation of this test on the proof of its relationship to academy performance instead of job performance, the Court's decision in *Washington v. Davis,* 426 U.S. 229 (1976) does not make it error. *Davis* is not a Title VII case and its acceptance of a test which validly predicted training course performance by requiring a minimum standard of literacy is not controlling.

Furthermore, an unbroken line of precedent under Title VII beginning with this Court's decision in *Griggs v.*

Duke Power Co., 401 U.S. 424, 426 (1971) makes it clear employers must rely only on criteria "significantly related to successful job performance".

Less Discriminatory Alternatives

Petitioners' final question does not merit review by this Court because the decision below is correct without regard to its resolution and therefore this Court is not likely to reach it regardless of its merit.

This Court is asked to decide whether an employment test having no disparate impact between male and female applicants is an acceptable alternative to tests with such an impact, where the alternative discriminates against black job applicants.

In a Title VII action the question of less discriminatory alternatives arises only after the employer meets the burden of showing that employment tests that have a discriminatory impact are job-related. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-2 (1973). In this case the lower court correctly found the employment tests were not job-related; therefore, the question of a less discriminatory alternative is not raised.

Further, the record contains no showing of a statistical disparity between the performance of blacks and whites on the test. Further, biographical data was also found to be a better alternative basis for selection. The record contains no reference to a disparate impact between blacks and whites on the basis of biographical data.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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